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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 484

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROSIKA SCHWIMMER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The only expression of opinion by the District Court is that contained in the order denying the petition. (R. 14.) The opinion of the Circuit Court of Appeals (R. 17) is reported in 27 F. (2d) 742.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1928. (R. 20.) Petition for certiorari was filed September 29, 1928. (R. 21.) The jurisdiction of this Court rests on the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented in this case is whether it is a fundamental principle of the Constitution and of our organized Government that they be defended by force of arms against armed invasion or armed insurrection, and whether an alien pacifist who will not bear arms in their defense and who is opposed to any citizen bearing arms for that purpose, and whose willingness to take the oath to support and defend the Constitution and laws against all enemies, foreign and domestic, must be qualified by a refusal to bear arms in defense of the Constitution or to support such a requirement of others, is attached to the principles of the Constitution and a believer in organized government within the meaning of the naturalization laws so as to be eligible to citizenship.

As secondary question is presented, and that is whether a woman who is a writer, author and propagandist of the doctrine that armed force should not be used to maintain the Constitution and Government should nevertheless be naturalized because incapable of bearing arms by reason of age and sex.

STATUTES INVOLVED

Subdivisions 3 and 4 of Section 4 and Section 7 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, 597, 598 (U. S. C. Title 8, Secs. 381, 382 and 364) read as follows:

SEC. 4. *Third.*—He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth.—It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same * * *.

SEC. 7. That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlaw-

ful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

STATEMENT

The respondent, Rosika Schwimmer, filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, a petition for naturalization. (R. 1.) The petition was denied by the District Court on the ground that the petitioner is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and further that she is unable to take the oath of allegiance prescribed by the naturalization law without a reservation. (R. 14.) She appealed to the Circuit Court of Appeals for the Seventh Circuit, which reversed the action of the District Court and remanded the case with direction to grant the petition for naturalization. (R. 20.)

Respondent was born in Budapest, Hungary, on September 11, 1877, and is a citizen of Hungary and by occupation an author and lecturer. (R. 2, 4.) She originally came to the United States to visit and lecture (R. 3), and filed a declaration of intention to become a citizen on November 16, 1921 (R. 1). The petition for naturalization was filed September 22, 1926. (R 1.)

In the preliminary form of petition for naturalization, in answer to the question whether she was willing to take up arms in defense of this country, she said (R. 6):

> I would not take up arms personally.

She has said of herself (R. 11):

> I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. I have no sense of nationalism, only a cosmic consciousness of belonging to the human family.

She stated she was ready to take the oath of allegiance because she found the Constitution and the institutions of the United States of America "nearest to my ideals of a democratic republic." (R. 8.) She stated that she was willing to do everything that an American citizen has to do except fighting, but that she would not do. (R. 13.) She said:

> I am an uncompromising pacifist * * *. (R. 11.)
>
> With reference to spreading propaganda among the women throughout the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that. (R. 13.)

The respondent is a clever woman. She was allowed, very largely, to make out her case by writ-

ten answers to the question propounded to her, and her answers were skillfully prepared and delivered, with the evident purpose of sticking to her convictions, but at the same time glossing over the difficult points in an effort to pass the naturalization test. There are some things in her statements which at first give the impression that her attitude towards the bearing of arms and her declared unwillingness to bear arms in the defense of the Constitution and laws of the United States had their foundation in the fact that she is a woman and that women are not ordinarily required to bear arms, but a close study of the record justifies the statement that her attitude towards the bearing of arms in defense of the Constitution and Government of the United States, or any government, has nothing to do with her sex or age and that she is opposed in principle to the bearing of arms in defense of the Government by men qualified by physical condition and age. Although some of her statements suggest that she does not desire to interfere with the action of others in these matters, the record justifies the statement that her opposition to the forcible defense of the Constitution and laws of the United States, or of any other organized government, has been and will be actively reflected in her speeches and writings, and that she can be depended upon to agitate against the discharge by others of this duty of citizenship.

The Circuit Court of Appeals said, first, that "mere views are not, by the statute, made a ground for denying a petition," and that there had been no conduct on her part indicating that she is a person not attached to the principles of the Constitution, and its conclusion to admit her to citizenship was finally based on the proposition that since she is a woman and considered incapable of bearing arms her attitude on the subject of pacifism and the defense of the Constitution and laws by force of arms was a mere hypothetical matter of no practical importance, and the questions propounded to her along these lines were hypothetical and "conundrums," and her attitude on this subject immaterial.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in finding and holding that the respondent was qualified for naturalization as a citizen of the United States.

2. The Circuit Court of Appeals erred in reversing the order of denial of the District Court, and in directing that the respondent's petition for naturalization be granted.

3. The Circuit Court of Appeals erred in holding that an alien who will not bear arms in defense of the Constitution and laws of the United States, and who is unalterably opposed in principle to the bearing of arms by any citizen in defense of our Government, and whose oath to support and de-

fend the Constitution of the United States against its enemies, is qualified by the exclusion of that kind of defense and support, and who is a writer, author, and propagandist by profession, is eligible to naturalization merely because personally disqualified by sex and age from bearing arms in defense of her country.

SUMMARY OF ARGUMENT

The naturalization laws require that applicants shall be attached to the principles of the Constitution and shall believe in organized government, and shall take an oath to support and defend the Constitution and laws against all enemies.

It is a fundamental principle of the Constitution and of organized government that they shall be defended by military force against invasion and insurrection. Without such defense the Constitution and Government could not exist. One who is opposed to such defense is not attached to the principles of the Constitution and does not genuinely believe in organized government.

That a candidate for citizenship is personally disqualified by age, sex, or physical condition from bearing arms does not render his or her opposition to armed defense of the Constitution immaterial or relieve him or her from the requirement of attachment to that principle of the Constitution. The influence of such persons of the action of others may be even more important than their own refusal to bear arms.

The respondent is unalterably opposed to defense of the Constitution and Government of the United States by armed force. She would prefer to see them destroyed by invasion or insurrection than have them so defended. She is opposed to armed defense by citizens who are qualified for military service. She is an author, public speaker, and propagandist who broadcasts her views on these subjects and may be depended upon to exert her influence in their support. She is therefore not attached to the principles of the Constitution. She can not properly take the oath to support and defend the Constitution and laws against enemies, because she can not and will not defend and support armed defense by other citizens.

The Circuit Court of Appeals was in error in holding that opposition to armed defense against invasion and insurrection is only material in the cases of those who are themselves fit to bear arms.

Those who are actively opposed to defending the Constitution and Government of the United States against foreign and domestic enemies are not entitled to the protection and privileges of citizenship.

ARGUMENT

The Preamble to the Constitution of the United States states that one of its purposes is to provide for the common defense. Congress has been given power to declare war, to raise and support armies, to provide and maintain a Navy, to make rules for

the government and regulation of the land and naval forces, to provide for calling forth the militia in certain emergencies, and to provide for organizing an army. The very existence of the Government depends upon the exercise of these powers and on the rendering of military service by its citizens.

The Second Amendment declares:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Section 7 of the Naturalization Act of June 29, 1906, provides that no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government shall be naturalized. There never has been an organized government which survived any length of time which did not have the power to defend itself by force of arms or whose citizens were not bound to perform military service in its defense when called upon.

Defense of the Constitution and laws of the United States by force of arms when necessary is a fundamental principle of the Constitution, and is a necessary feature of all organized government, and no person who is opposed to such defense and to such service by citizens is attached to all the principles of the Constitution or believes completely in the conception of organized government.

In dealing with the validity of the 1917 Draft Act, this Court said in the *Selective Draft Law Cases*, 245 U. S. 366, 378:

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 and 2. To do more than state the proposition is absolutely unnecessary * * *.

In conclusion Chief Justice White said (p. 390):

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude * * *.

To similar effect see *Cox* v. *Wood*, 247 U. S. 3.

The Circuit Court of Appeals was quite wrong in saying that mere views or beliefs are not made by statute a ground for denying a petition for naturalization. Section 7 of the Naturalization Act disqualifies applicants for mere beliefs or disbeliefs in various features of government, and past conduct alone is not the test. In *Luria* v. *United States*, 231 U. S. 9, it was said (p. 23):

> In other words, it was contemplated that his admission should be mutually beneficial

> to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

The court below also suggested that the provision of the Naturalization Act that—

> Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

means only that the applicant shall have behaved and conducted himself in a way to show attachment to the principles of the Constitution, and that the section refers only to past conduct and not to be-

liefs or actual attachment to those principles. In this respect it is clearly in error.

In the case of *In re Shanin*, 278 Fed. 739, 740, the court said:

> Attachment to the principles of the Constitution means, I take it, attachment to the principles of free government which are embodied in that instrument. "Attachment" is a stronger word than "well disposed." Used in this connection it implies, I think, a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them. It is to persons holding such views, and to them only, that citizenship in this country is open.

(See also to the same effect, *In re D—*, 290 Fed. 863.)

Attachment to that principle of the Constitution which calls for defense of the Constitution and laws of the United States by military force where necessary does not require that an applicant shall believe in militarism. In the instructions given to the jury in the United States District Court for Oregon by Judge Wolverton, in the case of *United States* v. *Ruttula* (not reported), where the defendant was charged with perjury in a naturalization proceeding because he swore that he was attached to the principles of the Constitution of the United States, when in truth he was not so attached, particularly to that principle of the Constitution providing for the maintenance of armed forces for the

suppression of domestic violence or insurrection within and the resistance to armed aggression of a foreign foe from without, the court said:

> You are instructed that it is a fundamental principle of the government of the United States that every person capable of bearing arms is under a legal duty to the government of the United States to render military service for its protection and defense without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions; unless specifically excused or exempted from such duty by law, or unless he be an ambassador or other diplomatic representative of a foreign nation, or unless he be an alien enemy of the United States.
>
> I instruct you that where a person says under oath "I am attached to the principles of the Constitution" it is equivalent to a declaration that he is in close and steady adherence to such principles, or has fidelity thereto, or has real or strong liking therefor, or is in sympathy with such principles or believes therein, or is well disposed to the good order and happiness of the United States. The word "principles" simply means fundamental or general truths, or maxims, or settled rules of action or procedure, or governing laws of conduct, or rules exercising a generally governing or guiding influence, or reasons or sources, or motives.
>
> In your deliberations, it is of primary importance that you distinguish between a be-

lief or disbelief in militarism, as the term is applied as respects Germany, for instance, for aggrandizement and the increase of power for aggression, and a belief or disbelief in the principle of maintaining armed forces for repelling invasion and repressing insurrection under a republican form of government. Militarism is not a principle of the Constitution, and does not inhere in the Government, while the other principle is in full consonance with the maintenance of the free institutions of our Government. Generally speaking, we are all in favor of peace. We are a peace-loving, not a warlike nation. Mr. Carnegie is devoting much of his vast wealth to the promotion of a world's peace, and there is an organization in this country which has for its primary purpose the establishment of an international court for the enforcement of a world's peace. In this sense, we are in favor of peace and despise war. But this also is not to be confused with the principle of our Constitution promotive of the maintenance of organized armed forces for securing peace at home against the aggression of a foreign foe and insurrection from within which are subversive of the liberties and freedom which we so ardently espouse. Peace propaganda for lending aid and comfort to a foreign foe is inimical to this primordial principle, so that persons engaged therein can not be said to be attached to the principles of the Constitution.

The naturalization laws do not provide that an applicant who is incapacitated from bearing arms by age, physical condition, or sex shall be relieved of taking the oath of allegiance to support and defend the Constitution and laws of the United States against all its enemies or relieved from showing an attachment to the fundamental principles of the Constitution and of organized government, including the principle that the Constitution and Government shall be defended against invasion and insurrection and kept in existence by force of arms if necessary. The fact that the applicant for citizenship may or may not be able to bear arms is not the sole consideration. The mental attitude of the individual towards the Government and its defense, with its necessary influence on others, is a vital matter. The importance of that is illustrated by *Schenck* v. *United States*, 249 U. S. 47.

The applicant's intellectual attitude towards the institutions of the country are of importance. The applicant in this case says she has "no sense of nationalism, only a cosmic consciousness of belonging to the human family" (R. 11); also that she is "an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist."

The tone of the respondent's statement shows that she is an extremist. Because of her sex and age there is, of course, no possibility that the respondent would ever be called upon personally to bear arms in defense of this country, but she does not believe

in other people bearing arms in defense of the country, and she is a writer, author, and propagandist by profession. She does not believe in organized government as we understand it, because organized government can not exist without military defense. She is not attached to the principles of our Constitution and Government when she rejects the fundamental principle that they must be defended by military force if necessary. She would see the Constitution and the Government of the United States destroyed by an enemy rather than have one citizen lift a finger in their defense. If every citizen believed as she does, and acted as she will, we would have no Constitution and no Government.

In *United States* v. *Manzi*, 276 U. S. 463, the Court said (p. 467):

> Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.

Refusal to perform military service on account of religious scruples is not involved in this case. The respondent has no religion. The fact that Congress in enacting the Selective Draft Law provided that persons who were already citizens and who had conscientious religious scruples against military service should be given noncombatant duties does not indicate that aliens opposed to performance of

military service should be admitted to citizenship. Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest tolerance for the individual views of alien applicants which might interfere with full and complete performance of the duties of citizenship. Congress indicated its attitude as to admission to citizenship and military service when it provided in the Act of July 9, 1918, c. 143, 40 Stat. 845, 885:

> That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States

Respondent cites a number of cases holding that the making of a claim of statutory immunity from military service by an alien during the late war did not permanently disqualify him for naturalization. There are a number of District Court decisions the other way, but the question here presented is different. This is not a case of an alien who has availed

himself of a statutory immunity from military service.

The Naturalization Act requires that—

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship

that he has the necessary qualifications. The Circuit Court of Appeals had no authority to substitute its judgment for that of the District Court. It may not be said, as a matter of law, that respondent conclusively established her right to admission. If the Circuit Court of Appeals had contented itself with granting a new trial so as to allow the past record and mental attitude of this respondent to be more thoroughly searched and disclosed in the record, it would have gone to the limit.

CONCLUSION

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals should be reversed.

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MARCH, 1929.

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